85-2041 (1)

SUPREME COURT, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1985

COLONY SQUARE COMPANY,
a Georgia Limited Partnership, *Petitioner,*

v.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

(1) Did the Court of Appeals err in holding that, notwithstanding 28 U.S.C. §1334(d) (giving the court in which a bankruptcy petition is filed "exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case") and 11 U.S.C. §541 (drawing into the debtor's bankruptcy estate "all legal or equitable interests of the debtor in property as of the commencement of the case"), the bankruptcy court in which a debtor files a petition for relief cannot exercise jurisdiction over property of the debtor as to which a creditor asserts a claim under a plan of arrangement confirmed in a prior bankruptcy case commenced over six years prior to commencement of the subsequent proceeding?

(2) Did the Court of Appeals err in holding that a lawful bankruptcy filing does not trigger the protection of the automatic stay provision, 11 U.S.C. § 362, against efforts to obtain title to property of the debtor's estate by enforcement of a plan of arrangement in a previous bankruptcy proceeding?

(3) Did the Court of Appeals err in holding that Congress intended in § 403(a) of the Bankruptcy Reform Act of 1978 (the "Code"), Pub. L. No. 95-598, 92 Stat. 2683 (1978), to deprive a debtor of the right to file a petition in bankruptcy more than six years after a prior petition which resulted in a discharge of indebtedness when the debtor would have had such a right under the Bankruptcy Act of 1898, former 11 U.S.C. § 1 et seq. (the "Act"), if the Act were still in existence, or under the Code, if the Code had been in existence at the time of the first petition?

(4) Did the Court of Appeals err in holding that a bankruptcy court, pursuant to its retention of jurisdiction

over a plan of arrangement confirmed in a previous bankruptcy proceeding, could enjoin a debtor and its creditors from proceeding with a bankruptcy reorganization commenced by the filing by certain unsecured creditors of an "involuntary" Chapter 7 petition?

(5) Did the Court of Appeals err in holding that a bankruptcy court need not permit a debtor to assert and need not hold an evidentiary hearing on a debtor's defenses that its single secured creditor, in its capacity as the debtor's tenant, has willfully and/or negligently mismanaged the debtor's principal tangible asset, a real estate development, before transferring title to such real estate development to the tenant-creditor pursuant to a contractually agreed upon plan of arrangement confirmed in a prior bankruptcy case?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Colony Square Company, a Georgia Limited Partnership, and the respondent, The Prudential Insurance Company of America.

In the proceedings below that pertained to issues arising from the petition filed by Colony Square Company under Chapter 11 of the Code, the Committee of Holders of Partnership Interests, formed with the approval of the United States Bankruptcy Court for the Western District of Pennsylvania, was an additional party, either appearing with or in support of Colony Square Company. A Committee of Unsecured Creditors was approved by the same Court and appeared with or in support of Colony Square Company before that Court and the United States Bankruptcy Court for the Northern District of Georgia in the same proceedings.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Colony Square Company, through its counsel, petitions for a writ of certiorari to review the decisions and judgments of the United States Court of Appeals for the Eleventh Circuit rendered in these related cases on January 10, 1986 and May 6, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit dated May 6, 1986 is reported at 788 F.2d 739 and is reproduced in the appendix hereto at 1a.[1] The opinion of the United States Court of Appeals for the Eleventh Circuit dated January 10, 1986 is reported at 779 F.2d 653 and is reproduced in the appendix hereto at 5a.

The orders and opinions of the United States District Court for the Northern District of Georgia, Atlanta Division dated June 27, June 26, April 4 and April 2, 1985 have not

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[1]The appendix to this petition, because of its voluminous nature and in accordance with Supreme Court Rule 21.1(k), is separately bound and presented. Citations to the appendix will be indicated as (a).

been reported. They are reproduced in the appendix hereto at 11a, 18a, 25a, and 26a, respectively.

The opinion of the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division, dated March 23, 1984 is reported at 40 Bankr. 603, and is reproduced in the appendix hereto at 64a. The two opinions of the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division, dated June 25, 1984 and the opinion dated May 11, 1984 are not reported. They are reproduced in the appendix hereto at 44a, 53a, and 57a, respectively.

The order of the United States Court of Appeals for the Third Circuit dated December 2, 1983 has not been reported, but the decision is noted at 725 F.2d 669. The order is reproduced in the appendix hereto at 72a.

The opinion of the United States District Court for the Western District of Pennsylvania dated April 18, 1983 is reported at 29 Bankr. 432 and is reproduced in the appendix hereto at 80a. Two orders dated November 9, 1983, are not reported; they are reproduced in the appendix at 74a and 77a.

The opinion of the United States Bankruptcy Court for the Western District of Pennsylvania dated May 10, 1982 is reported at 22 Bankr. 92 and is reproduced in the appendix hereto at 99a. The Order Amending Opinion of the same court dated May 20, 1982, is reproduced in the appendix hereto at 98a.

Additional orders and opinions relating to the cases under review are cited in this petition and reproduced in the appendix as appropriate.

JURISDICTION

Petitioner seeks review of two related decisions of the United States Court of Appeals for the Eleventh Circuit. A rehearing of the judgment and opinion dated and entered January 10, 1986 was timely sought and denied on March 14, 1986. No rehearing has been sought for the decision dated and entered May 6, 1986.

The jurisdiction of this Court to review the judgments of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

RULE 19.4 STATEMENT

Supreme Court Rule 19.4 states in part:

> When two or more cases are sought to be reviewed on certiorari to the same court and involve identical or closely related questions, it will suffice to file a single petition for writ of certiorari covering all the cases.

Petitioner submits that the questions involved in the two decisions sought to be reviewed on certiorari involve closely related questions. The parties to the two decisions are identical; the decisions arise from the same nucleus of facts; and both decisions reject Colony Square's contention that its second bankruptcy petition could not be summarily dismissed and the Bankruptcy Code's automatic stay could not be rendered void and inapplicable by the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division. The Eleventh Circuit recognized this in its opinion dated May 6, 1986, which may be found in the appendix attached hereto at 1a. On page 3 of the Opinion (4a), the court noted that its decision therein was compelled by the decision previously rendered on January 10, 1986.

Petitioner submits that the two closely related Court of Appeals decisions address and decide important questions arising under the national bankruptcy policy contrary to the governing statute and decisions of other judicial circuits.

Petitioner therefore respectfully prays this Court to issue a writ of certiorari for review of both judgments pursuant to Supreme Court Rule 19.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 4 of the United States Constitution.

The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . .

Section 403(a) of the Bankruptcy Code, Pub. L. No. 95-598, 92 Stat. 2683 (1978), Note Preceding 11 U.S.C. § 101.

§ 403. (a) A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act [i.e., the Code] had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act [i.e., the Code] had not been enacted.

Section 362 of the Bankruptcy Code, 11 U.S.C. § 362.

§ 362. Automatic Stay. (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, . . . , operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

Section 727(a)(8) of the Bankruptcy Code, 11 U.S.C. § 727(a)(8).

§ 727. Discharge. (a) (a) The court shall grant the debtor a discharge, unless—

> . . . (8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371 or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition. . . .

Section 14c(5) of the Bankruptcy Act, 11 U.S.C. § 32c(5) (repealed).

§ 14c. The court shall grant the discharge unless satisfied that the bankrupt has . . . (5) [i]n a proceeding under this Act commenced within six years prior to the date of the filing of the petition in bankruptcy . . . been granted a discharge, or had a composition or an arrangement by way of composition or a

wage earner's plan by way of composition confirmed under this Act; . . .

Section 541(a) of the Bankruptcy Code, 11 U.S.C. § 541(a).

§ 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * *

28 U.S.C. § 1334(d).

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.

STATEMENT OF THE CASE

A. Procedural and Factual Background

Petitioner, Colony Square Company ("Colony Square"), is a limited partnership having its principal place of business in Pittsburgh, Pennsylvania. Under its former name, Peachtree Fourteenth Limited Partnership, Colony Square was organized in August 1967 to acquire certain land in Atlanta, Georgia, for development as a multi-use real estate complex comprising office buildings, a hotel, apartment buildings, a parking garage and retail shops. By the autumn of 1975, Colony Square had succeeded in completing most of the construction and in creating the business arrangements in accordance with which the complex would be operated.

Because it was unable to meet its obligations as they came due, Colony Square petitioned the United States District Court for the Northern District of Georgia, Atlanta Division

(the "Atlanta District Court") on October 16, 1975 for an arrangement with its creditors under Chapter XII of the Bankruptcy Act of 1898 as then in effect.[2] By order dated March 30, 1977, the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division (the "Atlanta Bankruptcy Court") confirmed the Plan of Arrangement ("Plan") for Colony Square that had been drafted and proposed by Respondent, The Prudential Insurance Company of America ("Prudential"), the principal secured creditor of Colony Square. The March 30, 1977 Order (the "Confirmation Order") discharged all indebtedness of Colony Square, except for its indebtedness to Prudential. Following confirmation of the Plan, Colony Square continued its business and incurred new indebtedness to several unsecured creditors.

The Plan included a Lease and a Moratorium Agreement that contemplated, in general, that Colony Square would continue its ownership of most of the Colony Square Complex, including the office buildings, the hotel, the parking garage and the retail mall (the "Leased Property"), with Prudential, as lessee, responsible for its management. In accordance with the Plan, each year, the "Net Cash Flow" (as defined in the Lease) from the complex was credited to Colony Square as rent under the Lease, and was applied against Colony Square's debt to Prudential. Significantly, the Lease provided that Prudential would have complete management control over the Leased Property. Prudential took over possession and management of the Leased Property on March 1, 1977 and has been in complete control since that time.

The Moratorium Agreement provided, *inter alia*, that prior to January 1, 1982, Colony Square had no obligation to

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[2]The Bankruptcy Act of 1898, as amended, will be referred to in this Petition as the "Act"; the Bankruptcy Reform Act of 1978, which replaced the Act, will be referred to as the "Code". Since many of the events leading up to this petition, the Code was amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984). The amendments, including the replacement of 28 U.S.C. § 1471 with 28 U.S.C. § 1334 and the revision of 11 U.S.C. § 362(a), are not material for present purposes.

make payments of principal on account of its indebtedness to Prudential, except to the extent of the rental payments received from Prudential under the Lease. It further provided that the unpaid balance of such indebtedness with interest as specified was due on January 1, 1982. In the event Colony Square did not bring its indebtedness to Prudential current prior to January 1, 1982, the original maturity date of the debt would be reinstated. The Moratorium Agreement also provided that, if Colony Square did not bring the secured debt owed to Prudential current or pay the unpaid principal balance of the indebtedness prior to January 1, 1982, Prudential would be entitled to foreclose or, at its option, to purchase the property securing the indebtedness in exchange for cancellation of Colony Square's indebtedness to Prudential.

Colony Square has contended that the terms of the Lease, Moratorium Agreement and Plan placed Colony Square and Prudential in a relationship of trust. For several years, Colony Square has claimed that, by failing to manage the Leased Property with due care in a reasonably skillful manner and consistent with good business practices, Prudential violated the fiduciary duty inherent in such a relationship, prevented Colony Square from bringing its indebtedness current, and made it impossible for Colony Square to comply with the terms and conditions of the Plan and the Moratorium Agreement. Further, Colony Square has contended that Prudential mismanaged the Leased Property deliberately so that it could gain title to the Leased Property since such title was of far greater value to Prudential than the payment of Colony Square's debt.[3]

Because Colony Square could not meet its obligations under the Moratorium Agreement, it filed a petition under

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[3]On April 29, 1986, the Atlanta Bankruptcy Court entered an Order granting Prudential's Motion For Summary Judgment with respect to Colony Square's mismanagement claims. In the Order, the Atlanta Bankruptcy Court relied on certain technical provisions of the Lease and refused to reach the merits of Colony Square's mismanagement claims. Colony Square timely noticed its appeal to the Atlanta District Court from this Order on May 9, 1986.

Chapter 11 of the Code on January 28, 1982 in the United States Bankruptcy Court for the Western District of Pennsylvania ("Pittsburgh Bankruptcy Court"). By motion, Prudential disputed the Pittsburgh Bankruptcy Court's jurisdiction and venue, questioned Colony Square's good faith, and challenged the timeliness of the petition. The Pittsburgh Bankruptcy Court, in an opinion by the Honorable Joseph L. Cosetti (99a), concluded that: (1) it did have jurisdiction over Colony Square's January 28, 1982 petition notwithstanding the Atlanta Bankruptcy Court's retention of jurisdiction over the Plan in the Chapter XII proceeding;[4] (2) Colony Square filed the petition in good faith; (3) the petition was timely filed; (4) abstention under 11 U.S.C. § 305 was not proper; (5) venue existed in the Pittsburgh Bankruptcy Court; and (6) abstention under the then effective 28 U.S.C. § 1471(d) was not proper. The Pittsburgh Bankruptcy Court also made certain findings of fact, including that Colony Square's general partner has its principal place of business in Pittsburgh, Pennsylvania.

Prudential appealed the Pittsburgh Bankruptcy Court's decision to the United States District Court for the Western District of Pennsylvania ("Pittsburgh District Court"), which, in dicta, was critical of Judge Cosetti's jurisdictional holding but which itself exercised jurisdiction by transferring the case to the Atlanta District Court on forum non conveniens grounds (80a); the case was then referred to Bankruptcy Judge Hugh Robinson who had presided over the Colony Square Chapter XII proceedings.[5] Judge Robinson dismissed Colony Square's Chapter 11 case by Order dated March 23, 1984 (64a). That Order was affirmed by the Atlanta District Court

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[4]The language by which the Atlanta Bankruptcy Court purported to retain jurisdiction is quoted in Judge Cosetti's opinion at 99a-100a.

[5]Colony Square has contended that Judge Robinson had a significant conflict of interest requiring his disqualification under 28 U.S.C. § 455. In its Motion for Disqualification filed on August 31, 1984, Colony Square maintained that both Colony Square's Chapter XII case (which Judge Robinson viewed as a proceeding for liquidation of the Debtor) and its Chapter 11 case could not be handled by the same bankruptcy judge. Colony Square's

(Continued on next page)

and the Eleventh Circuit (11a; 1a). Review of the Eleventh Circuit's decision is sought here.

On May 14, 1984, the Atlanta Bankruptcy Court issued an Order (57a) that denied Colony Square the opportunity to assert Prudential's mismanagement as a defense to Prudential's efforts to obtain record title to the Leased Property. The

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(Continued)
Motion for Disqualification of Judge Robinson was denied by Judge Robinson by an opinion/order dated October 30, 1984. That decision was affirmed by the Atlanta District Court on December 29, 1984.

In May of 1985, Colony Square counsel learned facts indicating that Judge Robinson's bias and prejudice were far worse than imagined. Only two hours after submission of Colony Square's final brief and conclusion of oral argument regarding Prudential's effort to obtain title to the Leased Property, Judge Robinson telephoned lead Prudential counsel on an *ex parte* basis and requested Prudential counsel to author the Court's order/opinion purporting to grant Prudential's Motion in this matter and to transfer title of Colony Square's $175 million property to Prudential. The order, *precisely as secretly authored by Prudential counsel*, was entered by Judge Robinson without notice to or awareness of Colony Square of its improper conception and birth. That Order transferring title, after affirmance by the Atlanta District Court, was affirmed by the Eleventh Circuit's January 10, 1986 decision, which is, in part, the subject of this petition. Other orders and opinions were also the subject of improper *ex parte* communications between Judge Robinson and Prudential counsel leading to secret authorship thereof by Prudential attorneys. Included among these was the 21-page opinion denying Colony Square's first Motion for Disqualification.

On June 6, 1985, Colony Square filed a Motion for Disqualification and Other Relief in the Atlanta District Court. After discovery and a 4-day hearing, the Atlanta District Court, by Order of May 9, 1986 (120a), denied in its entirety Colony Square's Motion for Disqualification and Other Relief, despite the court's recognition that two key orders, including a 21-page opinion, were secretly authored in their entirety by Prudential counsel without notice to Colony Square. The District Court concluded that Prudential's attorneys acted improperly and disapproved of the manner in which the secretly authored orders were prepared, but nonetheless denied any relief to Colony Square.

Colony Square has noticed an appeal to the United States Court of Appeals for the Eleventh Circuit and intends to pursue all avenues of appellate relief with respect to the ethically suspect activities of the bankruptcy judge in Atlanta.

Court thus set the stage for transfer of title to the Leased Property *before* hearing any of Colony Square's defenses arising from Prudential's mismanagement. By Order of June 25, 1984 (44a) (the "Title Transfer Order"), the Atlanta Bankruptcy Court transferred title to the Leased Property from Colony Square to Prudential by a self-executing Order pursuant to Fed. R. Civ. P. 70. The Title Transfer Order also has been affirmed by the Atlanta District Court and the Eleventh Circuit, whose decision is the subject of this petition.

Before the Title Transfer Order, on April 30, 1984, L.R. Management, Inc., L.R. Property Management, Inc. and Loeb Capital Corporation ("Petitioning Creditors"), based on debts outstanding and unpaid since November 20, 1981, filed with the Pittsburgh Bankruptcy Court an Involuntary Petition for Relief Under Chapter 7 of the Bankruptcy Code,[6] thus triggering the automatic stay provisions of 11 U.S.C. § 362(a). The debts underlying the Involuntary Petition were incurred by Colony Square after the Chapter XII Plan had been established and implemented. The Petitioning Creditors were not parties to the Chapter XII case.

On June 23, 1984, Prudential filed a Motion for Issuance of Order in Aid of Jurisdiction with the Atlanta Bankruptcy Court. On the next day, June 24, 1984, Colony Square filed a Verified Complaint and Motion for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction with the Pittsburgh Bankruptcy Court on the grounds that any effort by Prudential to obtain title would be in direct violation of the automatic stay provision of § 362(a) of the Code. In addition to its Title Transfer Order, on June 25, 1984, the Atlanta Bankruptcy Court issued an Order enjoining Colony Square, its partners, agents, attorneys, representatives and creditors from pursuing or enforcing their rights under the

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[6]On June 20, 1984, Colony Square, pursuant to 11 U.S.C. § 706(a), elected to convert the case to a reorganization proceeding under Chapter 11. Also on June 20, 1984, Colony Square filed a Chapter 11 Plan which provides for payment in full of all claims of its creditors, including Prudential.

Bankruptcy Code in any jurisdiction outside the Atlanta Bankruptcy Court with regard to the Leased Property and Prudential's claims (53a). Significantly, the Petitioning Creditors were enjoined even though the Chapter XII plan could not conceivably provide for their claims, which arose after the close of that proceeding. Review of the Eleventh Circuit's affirmance of the Atlanta Bankruptcy Court's June 25 injunction Order is sought here.

On June 27, 1984, the Pittsburgh Bankruptcy Court declined to issue a Temporary Restraining Order or a Preliminary Injunction on the grounds that the automatic stay of Section 362 of the Code provided adequate protection without superimposing an injunction. In its Order of the same day, the court reasoned from the central bankruptcy principles and statutory provisions articulated in this petition:

> This Court believes that a TRO or Preliminary Injunction Order would be redundant under these circumstances and that *11 U.S.C. § 362 is adequate to protect the Debtor's interests in property anywhere. 11 U.S.C. § 541 clearly creates an estate which includes all legal and equitable interests of the Debtor. The interest of the Debtor in the disputed real estate is such an interest.*

(93a-94a) (emphasis added).

B. The Judgments and Opinions Subject to Review

In its Opinion dated January 10, 1986, the Eleventh Circuit affirmed the decisions (i) transferring title to the Leased Property to Prudential and (ii) severing Colony Square's defenses grounded on Prudential's mismanagement from the question of title.

In its Opinion dated May 6, 1986, the Eleventh Circuit affirmed the decisions (i) dismissing Colony Square's first Chapter 11 case and (ii) enjoining Colony Square, its partners, agents, attorneys, representatives and creditors from litigating any and all matters concerning Colony Square, the Leased Property, the Chapter XII case and the Chapter 11 case in any

forum other than the Atlanta Bankruptcy Court or appeals taken therefrom.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Has Decided an Important Question Contrary To a Federal Statute and to Decisions of Other Circuits

For decades in this country, it has been a core principle of our national bankruptcy policy, embodied both in governing statutes and in case law, that debtors seeking bankruptcy relief are to be denied such relief "only when one or more *statutory* grounds of objection are proved." *Johnson v. Bockman*, 282 F.2d 544, 546 (10th Cir. 1960) (emphasis added). The Eleventh Circuit has clearly repudiated this principle and instead held that a bankruptcy court, operating outside the scope of its congressionally granted authority, can deny a debtor access to relief as it sees fit. The result is that the national bankruptcy policy, as prescribed under both the Act and the Code, has been significantly altered by judicial fiat, creating uncertainty, confusion, and a conflict among the judicial circuits.

A. The Eleventh Circuit's Affirmance of the Atlanta Bankruptcy Court's Dismissal of the Chapter 11 Petition Contradicts the Six-Year Rule in Both the Code and the Act

Colony Square submits that the dismissal on jurisdictional grounds of its Chapter 11 petition arrogates to the federal judiciary powers constitutionally reserved to the legislative branch of government. The courts below have read into the governing statute—the Bankruptcy Code—an additional jurisdictional requirement, a reading that is contradicted by the statute itself.

The Code, 11 U.S.C. §§ 727(a), 1141(d), contains an express list of requirements that must be met before a discharge of indebtedness can be granted. (In so doing, the Code merely carries forward the import of Section 14c of the Act.) By accepted statutory construction, the provision of these express requirements implies the exclusion of all others. *See*,

e.g., Marshall v. Gibson's Products, Inc., 584 F.2d 668, 675 (5th Cir. 1978).[7] Section 727(a)(8) of the Code provides as follows:

> The Court shall grant the debtor a discharge, unless
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> ...(8) The debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition.

The six-year rule in § 727(a)(8) demonstrates that Congress clearly envisioned that a prior petition leading to discharge filed more than six years before a subsequent petition by the same debtor would not bar the grant of a discharge in the second case.[8] Colony Square's 1975 Chapter XII petition (under the Act) did lead to discharge; its 1982 Chapter 11 petition (under the Code) was filed more than six years after the Chapter XII petition.

In considering the question of jurisdiction over the Chapter 11 proceeding commenced on January 28, 1982, Judge Robinson termed Colony Square's straightforward application of the statutory language to the operative facts "a sanitized interpretation." (70a). Judge Robinson thus indicated a policy

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[7]This principle is embodied in the ancient maxim, *expessio unius est exclusio alterius*. *See* 2A Sands, *Sutherland on Statutory Construction* § 47.24 (Rev.4th Ed. 1984)("[T]he expressio unius maxim ... is a product of 'logic and common sense.' It expresses the learning of common experience that when people say one thing they do not mean something else.")

[8]In fact, it is far from clear that any of the statutory restrictions on discharge applies directly to Colony Square as a Chapter 11 debtor. *See* Note, *Toward A Reform of the Six-Year Bar to Discharge in Bankruptcy* 97 Harv. L. Rev. 759, 769 (1984): ("[a] corporation can obtain repeated discharge in Chapter 11 without restrictions and without dissolving.") Section 727(a) has been held inapplicable to non-individual debtors under Chapter 11. *See International Ass'n of Machinists v. Airlift Int'l, Inc.*, 16 Bankr. 639, 640 (Bankr. S.D.Fla. 1981); *Delco Dev. Co. v. Kuempel Co.*, 14 Bankr. 324, 327 (Bankr. S.D. Ohio 1981). At the very least, however, compliance with the six-year rule ensures a non-individual debtor's right to file a second bankruptcy petition.

disagreement with congressional intent as evidenced by the plain language of the statute. It is respectfully submitted that this Court must not permit such reservations of a bankruptcy judge effectively to frustrate the legislative purpose of a statutory provision duly enacted by the United States Congress and signed into law by the President.[9]

Judge Robinson's March 23, 1984 Opinion is a telling example of an activist judicial response to legislation that a court finds discomforting:

> We hesitate to give the statute such a sanitized interpretation. Surely Congress did not contemplate a debtor's unfettered right to refile every six years, even if a bankruptcy case involving the same debt is still pending. As stated by the court in [*In re Stahl, Asano, Shigetomi Associates*, 7 Bankr. 181 (Bankr. D. Haw. 1980)],
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> > "While the plain language of a statute is the best indication of legislative purpose, it is well settled that a court must look beyond the plain meaning of the statute if the plain meaning would lead to absurd or futile results." (70a)

Neither Judge Robinson nor either of the reviewing courts below stated *why* application of the statute's plain meaning leads to an absurd or futile result and *why* departure from that language is so necessary.

B. The Eleventh Circuit's Affirmance of the Atlanta Bankruptcy Court's Dismissal of the Chapter 11 Petition Is in Conflict with Decisions of Other Circuits.

Prudential and the lower courts would appear to accept as an article of faith that a bankruptcy court is entitled to reserve exclusive jurisdiction over a debtor for as long as it wishes and in as broad terms as it wishes. But this is not the law. As the

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[9]The kind of judicial legislating indulged in by Judge Robinson, and affirmed by the Eleventh Circuit, is particularly inappropriate in view of this Court's recent references to the "plain meaning rule" and its insistence on strict adherence to statutory language. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

leading commentator has emphatically observed, "the court lacks power to keep the reorganized enterprise in tutelage." 6A *Collier on Bankruptcy*, ¶ 11.20, at 315 (14th ed. 1977). Circuit Judge Jerome Frank, in an opinion joined by Circuit Judges Augustus Hand and Charles Clark, wrote that "Congress did not intend that the Bankruptcy Court should, after an approval of a plan . . . , have power to remain a wet-nurse to the reorganized company. A bankruptcy court cannot obtain that power merely by inserting a provision reserving jurisdiction." *In re Flatbush Ave.—Nevins St. Corp.*, 133 F.2d 760, 762 (2d Cir. 1943). In *Flatbush Ave.*, the Second Circuit panel was disturbed by judicial interference with conduct of the parties five years after the plan had been approved—precisely the period of time involved in the present case. There is little question that the Second Circuit, in reliance on *Flatbush Ave.*, would have decided the present case precisely contrary to the Eleventh Circuit's decision.

In his Opinion, Judge Cosetti of the Pittsburgh Bankruptcy Court, relying expressly on the Second Circuit's ruling in *Flatbush Ave.*, concluded "that a reorganization case under the Bankruptcy Act or a Chapter 11 case under the Bankruptcy Code cannot be under the filing Court's protection indefinitely." (105a) Indeed, in oral argument on Prudential's Motion to Dismiss the Chapter 11 case, counsel for Prudential conceded that "there comes a time when, as the debtor has said, jurisdiction of a bankruptcy court must end." (165a) With this concession a matter of record, the sole remaining issue is whether the point of expiration of retained jurisdiction is to be left to judicial fiat when Congress has expressly spoken on the issue. The conclusion is obvious: Courts must respect the six-year rule contained in both the Act and Code. The Second Circuit would agree with this proposition; the Eleventh Circuit disagreed below. As stated by the Second Circuit in *Clinton Trust Co. v. John H. Elliott Leather Co.*, 132 F.2d

299, 303 (2d Cir. 1942), a bankruptcy court's retained jurisdiction is "in reality only auxiliary to [jurisdiction over confirming a plan]," and is not sufficient "for control of the corporation indefinitely or for keeping it in tutelage to the court, so that the latter must pass upon its business activities."

Further, the Eleventh Circuit's decision is inconsistent with judgments of other courts.[10] The United States Court of Appeals for the Tenth Circuit has noted unequivocally, and in stark contrast to the decision under review, that it is a "well established rule . . . that . . . a bankrupt is not to be denied a discharge on general equitable principles *but only when one or more statutory grounds of objection are proved.*" *Johnson v. Bockman*, 282 F.2d 544, 546 (10th Cir. 1960) (emphasis added).

The case of *In re Hale*, 274 F. Supp. 813 (W.D. Va. 1967), is instructive. There, a frustrated creditor argued that the bankrupt had been granted two previous discharges in bankruptcy on voluntary petitions and "that to grant a third discharge shortly after the expiration of the six-year period provided for in section 14, sub. c(5) would be 'highly inequitable' in that it would allow the bankrupt to evade the just debts of his creditors thereby 'perverting the very purpose of the Bankruptcy Act.'" *Id.* at 816. The court was not convinced. It noted that "[o]ne of the primary purposes of the bankruptcy statutes is to give the honest debtor the opportunity to reinstate himself in the business world by relieving him from the payment of his dischargeable debts," *id.*, and concluded:

> Congress having expressly provided that a bankrupt must wait six years before receiving further relief in another bankruptcy proceeding, the Court may not rewrite the statute on the basis of the equitable considerations advanced by the petitioner. It is a well established rule that a bankrupt is not to be denied a discharge on general

[10]Of course, the Eleventh Circuit's decision is directly contrary to Judge Cosetti's May 10, 1982 decision. (99a).

> equitable principles but only when one or more statutory grounds of objection are proved.

Id. When no such statutory grounds of objection are asserted, much less proved, it would appear *a fortiori* that a petition should not be dismissed.

The lower courts saw fit, by judicial fiat, to read into the Code and the Act a new rule—one that cannot be extracted from the language of the statutes—that limits the jurisdiction of a bankruptcy court to entertain a debtor's petition if that or another bankruptcy court has reserved jurisdiction over a previous bankruptcy plan, *no matter how long that plan has been in effect.* Other than § 403(a) of the Code (discussed *infra*), neither the courts below nor Prudential have indicated the statutory basis for the Atlanta Bankruptcy Court's authority to deny the debtor a right to file a petition under Chapter 11 in this case. No such authority exists. "If Congress in fact wishes to limit corporate redischarge, . . . it will have to say so, and not simply depend on the courts' undirected discretion to discern the 'spirit' of Chapter 11." Note, *Toward a Reform of the Six-Year Bar to Discharge in Bankruptcy*, 97 Harv. L. Rev. 759, 773 n.72 (1984).

Freshman v. Atkins, 269 U.S. 121 (1925), relied on with such certainty by the Atlanta Bankruptcy Court and the Atlanta District Court, is not to the contrary. Indeed, it should come as no surprise that the Court of Appeals failed to cite *Freshman* in either of its decisions for which review is sought. In *Freshman*, the debtor filed a voluntary petition and shortly thereafter applied for discharge. Discharge was contested and referred to a referee for a recommendation. The referee's report ultimately recommended that the Court deny discharge. Thereafter, there was no final action by the Court. *There was no discharge.* Over seven years after filing the first petition, the debtor filed a second voluntary petition. The Supreme Court held that failure to obtain discharge under the first proceeding barred an application for discharge under the second proceeding.

Clearly, such a factual situation is distinguishable from that of a mature, reorganized enterprise such as Colony Square, whose plan of arrangement had been judicially confirmed after a period of intensive negotiations and whose debts, operational features, composition, and array of creditors have changed substantially to reflect its business evolution subsequent to the first filing. In this case, unlike *Freshman*, the Chapter XII Court took final action. The Confirmation Order, paragraphs (c) and (d), expressly discharged Colony Square's debts other than the debt to Prudential. Thus, the underlying rationale of the *Freshman* holding is absent here. The facts are materially different. Indeed, even under the clearly distinguishable facts in *Freshman*, the court there did not dismiss the second petition on jurisdictional grounds; rather it assumed jurisdiction of the second case, and granted the debtor a discharge from all his debts that were not included in the first petition.[11]

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[11]Recent authority also supports Colony Square's position. In *Indiana National Bank v. Lones*, 50 Bankr. 801 (Bankr. W.D. Ky. 1985), the court was confronted with a debtor who filed multiple bankruptcies. The court permitted the second bankruptcy and discharged the debtor despite the plaintiff-creditor's objection that the debtor had waived his right to bankruptcy by reaffirmation. As one commentator has noted:

> [T]he decision in *Lones* illustrates that in order to avoid discharge of a reaffirmed debt in a subsequent case, a creditor should ask not only for reaffirmation but also for an agreement that the creditor may seek a determination from the court that the debt is nondischargeable. As a practical matter, this problem should not arise unless the payout period envisioned by the parties with respect to the reaffirmed debt exceeds the six-year period provided by Section 727(a)(8).

Bankruptcy Law Letter, December, 1985 at 8.

Colony Square and Prudential did not agree that Colony Square would not subject its debt to another bankruptcy proceeding after the expiration of the statutory six-year period. Like the debtor in *Lones*, Colony Square has a constitutionally founded right to seek the protection of the bankruptcy court, U.S. Const. art. I, § 8, cl. 4, and, like the debtor in *Lones*, Colony Square has never waived that right.

This Court should resolve the uncertainty in the lower courts surrounding the application of the six-year rule to repetitive bankruptcies by a single debtor and, in so doing, clarify the Court's decision in *Freshman.*

II. THE COURT OF APPEALS' DECISION UNDERMINES NATIONAL BANKRUPTCY POLICY BY FRACTURING THE UNITARY ESTATE OF THE DEBTOR AND BY VOIDING THE CODE'S AUTOMATIC STAY

The decisions under review contradict countless federal court decisions and all traditional understandings of bankruptcy law by fracturing the estate of the debtor between two bankruptcy proceedings. *See, e.g., Duggan v. Sansberry,* 327 U.S. 499, 511 (1946) (general policy of reorganization statute "that the entire administration of the estate should be centralized in a single reorganization court.") *Accord, e.g., In re Imperial "400" National, Inc.*, 429 F.2d 671, 677 (3d Cir. 1970). In explaining its decisions ultimately affirmed by the Court of Appeals, the Atlanta Bankruptcy Court, during oral argument on June 22, 1984, observed that

> this Court as a Chapter [XII] Court retained exclusive jurisdiction over this debt. That's not to say that there couldn't be another [Chapter 11] concerning other debts of Colony Square, in another Court. That Court would have jurisdiction over those debts, but this Court has exclusive jurisdiction over this particular debt . . . . (167a-168a)

In effect, by giving blind precedence to a bankruptcy court's retention of jurisdiction from an earlier proceeding, the lower courts have created a situation where pre-confirmation debts and post-confirmation debts are inevitably severed from one another into two proceedings—a result that is unwise, unmanageable, and unlawful.

A. **The Atlanta Bankruptcy Court Was Stayed from Proceeding in The Chapter XII Case by Application of the § 362 Automatic Stay of the Bankruptcy Code**

Section 362 of the Code provides that the filing of any petition for relief operates as a stay, applicable to all entities,

of adverse actions against the debtor or its property. The filing of the Chapter 11 petition and the involuntary Chapter 7 petition in Pittsburgh barred *any action* either by the Atlanta Bankruptcy Court or by Prudential outside those proceedings. Hence, a foreclosure action by Prudential subsequent to the filing of the Chapter 7 petition would be in direct violation of the automatic stay, *In re Murray*, 5 Bankr. 732 (D. Md. 1980), and any such action would be null and void. *In re Scott*, 24 Bankr. 738 (Bankr. M.D. Ala. 1982). Furthermore, any act to enforce or execute a judgment on the real estate would also violate the automatic stay under § 362(a)(2), (3). *E.g., In re Marcott*, 30 Bankr. 633, 636 (Bankr. W.D. Wis. 1983). It clearly does not matter that such a judgment was obtained in proceedings initiated before the filing of the petition. *In re Schwab*, 12 Bankr. 68, 71 (Bankr. D. Mass. 1981). Likewise, the *continuation* of the judicial proceeding in which permanent possession of the property has been sought would constitute a violation of the automatic stay. *See Association of St. Croix Condominium Owners v. St. Croix Hotel Corp.*, 682 F.2d 446 (3d Cir. 1982); *In re Lewis*, 15 Bankr. 643 (Bankr. E.D. Pa. 1981). In short, Prudential's continuing efforts to enforce the Chapter XII Plan and the Atlanta Bankruptcy Court's Title Transfer Order purporting to transfer title to the Leased Property constitute a direct violation of the automatic stay.

The integrity and vitality of any bankruptcy proceeding are a function, pure and simple, of the protection afforded the debtor by the automatic bankruptcy stay. In stark contrast to this traditional understanding, the Eleventh Circuit has created a dangerous precedent under which creditor-lessees from earlier proceedings can declare open season on bankruptcy debtors. The Eleventh Circuit decision thus creates great uncertainty in federal bankruptcy law, an uncertainty that is this Court's peculiar function to resolve.

B. Fracturing the Estate of the Debtor Violates Congressional Intent as Embodied in the Plain Language of the Code

Congress has expressly declared in Section 541(a) of the Code that the commencement of a case under the Bankruptcy Code creates a bankruptcy estate "comprised of . . . *all* legal or equitable interests of the debtor in property as of the commencement of the case." (Emphasis added.) Nothing in the statute or its legislative history suggests that a bankruptcy court may abrogate Section 541(a) by reserving "exclusive" jurisdiction over specific assets of a debtor's estate. In fact, the law is clear that bankruptcy courts are creations of Congress with statutorily prescribed jurisdiction that must be respected unless it runs afoul of the Constitution. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

The Eleventh Circuit's decisions under review, contrary to an abundance of statutory and decisional law, create a conundrum whereby the same debtor has assets and creditors simultaneously in two different courts. Nothing in the Bankruptcy Code equips the bankruptcy courts to deal with, and certainly nothing authorizes them to create, such a state of affairs. The Bankruptcy Code contemplates that all of a debtor's assets will be administered in a single forum. Thus, the filing of a petition for relief under the Code "creates an estate . . . comprised of all . . . legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a). The court in which the case is filed is vested with "exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of the estate." 28 U.S.C. § 1334(d). That court has the power and the duty to enforce the automatic stay under 11 U.S.C. § 362(a), which insulates all the property of the estate from the ravages and forays of "all entities," including other courts. *In re Critical Fork Coal Co.*, 18 Bankr. 422, 424 (Bankr. W.D. Va. 1982). Severing the bankruptcy estate in two squarely contradicts these statutory provisions and their

underlying unitary concept of the bankruptcy estate, and virtually guarantees procedural gridlock.

The proper procedure in this case, and others like it, would have been to allow the Pittsburgh Bankruptcy Court to determine for itself whether it has jurisdiction over the involuntary Chapter 7 Petition. *See In re Visioneering Construction, Inc.*, 661 F.2d 119, 122 (9th Cir. 1981) (noting the bankruptcy court's authority in the first instance to determine its own jurisdiction). By the same token, any questions concerning the scope of the automatic stay are best left to the bankruptcy court in which the debtor's case is pending. *See In re Baldwin-United Corp. Litigation*, 765 F.2d 343 (2d Cir. 1985). The Bankruptcy Code provides orderly procedures for both relief from and termination of the automatic stay. 11 U.S.C. § 362 (b), (d). Such procedures are to be followed no matter how pressing or how clear a creditor's right to the debtor's property appears to be. *In re Motley*, 10 Bankr. 141, 144 (Bankr. M.D. Ga. 1981). Thus, until such time Prudential seeks and receives relief from the stay triggered by the filing of the involuntary Chapter 7 Petition, the Atlanta Bankruptcy Court has no jurisdiction to act at all, and hence any action it purported to take, including those under review here, is void *ab initio*. Instead, by issuance of its Title Transfer Order, the Atlanta Bankruptcy Court, in an unseemly rush to judgment, usurped the jurisdiction of the Pittsburgh Bankruptcy Court and blithely ignored the congressionally established procedures for relief from the automatic stay.

Indeed, even more remarkably, after the unsecured creditors filed the involuntary Chapter 7 proceeding, the Atlanta Bankruptcy Court entered an injunction prohibiting them from seeking congressionally prescribed remedies in that proceeding, even though their debts arose after confirmation of the Plan in 1977. (53a) The same injunction prohibited the debtor and all other creditors from seeking relief in the new proceeding. By affirming this action (1a), the Eleventh Circuit further undermined the national bankruptcy policy's goal of

creating a unitary estate of the debtor pursuant to the filing of a petition for relief under the Code.

III. THE COURT OF APPEALS HAS CONSTRUED THE CODE'S TRANSITIONAL PROVISION CONTRARY TO ITS PLAIN MEANING AND HAS MISTAKENLY APPLIED, AND DANGEROUSLY EXTENDED, A DECISION OF THIS COURT

The courts below relied on the argument that § 403(a) of the Code forecloses Colony Square from eligibility for relief under the Bankruptcy Code. The manifest purpose of this provision is to prohibit application of the substantive provisions of the Code to pending cases brought under the Act. Colony Square has no quarrel with this common sense proposition.

The courts below gave § 403(a) a far broader reading, however, and ruled that this transitional provision prevented Colony Square from filing its Chapter 11 Petition. This reading of § 403(a) is a gross distortion of legislative intent. The enactment of the Code in 1978, after the Plan had been confirmed and before Colony Square had filed its petition for relief under Chapter 11, is a purely fortuitous circumstance in this case. Colony Square's arguments do not depend on any feature peculiar to the Code as opposed to the Act. As noted above, the six-year rule existed under the Act and was carried forward intact from the Act to the Code.[12] This case would be in exactly the same posture today if the Code had never been enacted or if it had been enacted ten years earlier. As it happened, Colony Square was obliged to file for relief under the Code because the Act was no longer in effect. If the Code had not been enacted, a filing under the Act would have presented precisely the same issues and would have been just as viable.

Colony Square's 1982 Chapter 11 filing, more than six years after the 1975 Chapter XII petition, was neither unforeseeable nor unfair to Prudential. Prudential proposed and

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[12]The Legislative History expressly recognizes this. *See* S.Rep. No. 989, 95th Cong., 2d Sess. 99 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess. 385 (1977); *see also* Note, *Toward a Reform of the Six-Year Bar to Discharge in Bankruptcy*, 97 Harv. L. Rev. 759, 762 (1984).

drafted the Plan which included a moratorium period extending beyond six years of the Chapter XII filing. Thus, Prudential knew in 1977 that Colony Square could do in 1982 exactly what it in fact did—make a second filing. Nothing in the Act would have prevented this. To hold that § 403(a) precludes a second filing is to attribute to Congress an intent to diminish the rights of debtors who have the bad luck to be caught in the transition period between the Act the the Code. Congress intended no such thing.

The lower courts mistakenly relied on *Central Trust Co. v. Official Creditors' Committee of Geiger Enterprises, Inc.*, 454 U.S. 354 (1982), a three-page *per curiam* opinion of this Court that addresses an issue dealt with by numerous lower courts under § 403(a) of the Code: What is the proper judicial response to a situation in which an entity in rapid-fire succession files two bankruptcy petitions; the first such petition was filed under the Act, and the entitlement to file the second petition arose *only* because of the fortuitous enactment of the Code? Almost uniformly courts have held that such ploys are not to be countenanced under § 403(a).

Geiger, however, is not applicable to the facts of Colony Square's Chapter 11 proceeding. In *Geiger*, a debtor filed a petition under Chapter XI of the Act *a scant six weeks* before the Code became effective. Shortly after the new statute's effective date, and less than five months after its first petition under the Act, the debtor moved to dismiss its proceeding under the Act so that it could file a new case under Chapter 11 of the Code. This Court apparently perceived this as an attempt to superimpose the substantive provisions of the Code (which were apparently more to the liking of the debtor) on to an existing Chapter XI case. Nothing of the sort has happened here. Colony Square has not sought to "refile" its Chapter XII petition. Rather, it seeks to put the old case entirely behind it and to exercise its right under the six-year rule in an entirely new proceeding. In contrast to the apparent efforts to exploit the new Code in *Geiger*, the present proceeding involves an already reorganized enterprise *which could*

have filed a new petition under the Act even if the Code had not been enacted. Thus § 403(a) of the Code simply has no relevance to this case. Colony Square's bankruptcy rights do not turn on any unique new benefit conferred on debtors under the Bankruptcy Code. Colony Square would be following exactly the same course if the Code had never been enacted.[13]

The Court of Appeals' mistaken reliance on *Geiger* amply demonstrates the confusion generated by that case and the singular need for clarification that can only be supplied by this Court. As Justice Stevens, joined by Justice Marshall, noted in his *Geiger* dissent, even under the facially suspicious facts present in *Geiger*, the majority's interpretation of § 403(a) was "inflexible" and likely to lead to results not within congressional contemplation at the time of the statute's enactment. 454 U.S. at 363. The decisions under review confirm this prediction. It is respectfully submitted that, as an alternative to this Court's limiting *Geiger* strictly to its facts, it may wish flatly to overrule the case as a clear detriment to federal bankruptcy practice.

Colony Square urges this Court to review the § 403(a) rationale of the Court of Appeals' decision and, at the very least, to limit *Geiger* to the scope of *this* Court's original decision. The lower courts have set a dangerous precedent for the future application of statutory provisions, like § 403(a), that prescribe the transition from one statutory scheme to its replacement. The need for legislative reform is certain to generate many transitions similar to the one from the Act to the Code. The constantly shifting legislative panorama requires

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[13]Judge Cosetti clearly recognized this in his May 10, 1982 Opinion (102a-103a):

> This Court agrees with the Debtor that on these facts this section [403(a)] is not applicable here. The section is applicable to a situation where a case was filed prior to the passage of the Bankruptcy Reform Act and the Debtor seeks to convert his case from one under the Act to one under the Code. *See* [*Geiger*]. In *Geiger* the six years had not passed. CSC argues that it could have filed a new case under the Bankruptcy Act and that it is not prohibited by the Code from doing so. The Geiger rationale is not applicable.

this Court's firm guidance. Colony Square submits that the lower courts' improper application of § 403(a), read in isolation from the Act and the Code, is an evasion of their responsibility to effectuate the purpose of the substantive statutes and of the transitional provision itself. The pressure on the judiciary to seize upon transitional provisions to dodge thorny questions in the body of the statutes is great; this Court must ensure that the judiciary does not bow to such pressure, thereby compounding the unpredictability and the perceived unfairness of the constant and rapid change in substantive law.

IV. The Court of Appeals' Affirmance of the Atlanta Bankruptcy Court's Severance of Colony Square's Defenses to the Transfer of the Leased Property Deprived Colony Square of Due Process and Conflicts With the Bankruptcy Law Decision of Another Circuit

The Court of Appeals perceived the burden to be on Colony Square to disprove the proposition that the promise and duty of Prudential to manage the Leased Property in accordance with the Plan and the Lease are independent of its right to obtain title to the Leased Property upon Colony Square's nonpayment of debt. However, the imposition of such a burden is clearly at odds with established contract law. The settled rule is that promises are not to be construed as independent. *See Restatement (Second) of Contracts* § 232 (1979).

This Court does not sit to review federal court determinations of state contract law, no matter how wrongheaded. However, the Constitution, art. 1, § 8, cl. 4, grants Congress the power "to establish . . . uniform laws on the subject of Bankruptcies throughout the United States." The idiosyncracies of local law cannot be permitted to frustrate national bankruptcy policy. *In re Colonial Realty Investment Co.*, 516 F.2d 154 (1st Cir. 1975). *Cf. Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957) (Implementation of national labor policy requires judicial development of federal substantive law.)

The Plan established a format of relationships widely employed in federal bankruptcy law; it is an integrated document that created a complex network of duties and relations between Prudential, as creditor, and Colony Square, as debtor, with the result that issues relating to Colony Square's compliance with the Plan are inextricably intertwined with, dependent upon, and logically follow Prudential's own compliance with the Plan. The Court of Appeals' interpretation of the Plan fails to take into account the commercial realities of this situation, which are replicated in bankruptcy courts across the country. Colony Square, like other bankruptcy debtors, never would have consented to the terms of the Lease had it not received the benefits of the Moratorium Agreement and the expected rents and profits from Prudential's management of the Leased Property. It is equally clear that Prudential would not have granted Colony Square a moratorium had it not been given possession of the Leased Property through the Lease. Judicial administration of the national bankruptcy policy will be obstructed by the Eleventh Circuit's decision severing the debtor's defenses, as the practical result of that decision is to permit lender-lessees to declare open season on debtors irrespective of the congressional goal of debtor rehabilitation. As a result, debtors are likely to contest bitterly the imposition of any arrangements similar to those contained in the Plan.

The Court of Appeals' opinion also fails to take into account another principle of contract law that permeates federal bankruptcy practice—that one party may not prevent or hinder another party's performance and take advantage of that failure to perform. *Nitram, Inc. v. Cretan Life*, 599 F.2d 1359, 1371 (5th Cir. 1979). This principle, also known as the prevention doctrine, is a staple of bankruptcy practice and recently was applied in a bankruptcy context by the United States Court of Appeals for the Eighth Circuit in *Stevenson v. Stevenson Associates*, 777 F.2d 415 (8th Cir. 1985). There, in facts analogous to those presented here, the Eighth Circuit would

not permit a party to gain from its own wrongdoing, as Prudential has here, through summary dismissal of a plaintiff's claim.

Moreover, Colony Square was not permitted to adduce evidence on the intent of the parties relating to the interdependence of their respective promises in the key Plan documents. The right of a litigant to be heard has been characterized as "one of the fundamental rights of due process of law." *Council of Federated Organizations v. Mize*, 339 F.2d 898, 901 (5th Cir. 1964). The right to hearing is "the essence of our judicial system, and the judge's feeling that the case is probably frivolous does not justify by-passing that right." *Harmon v. Superior Court*, 307 F.2d 796, 798 (9th Cir. 1962). Here, Bankruptcy Judge Robinson refused even to receive Colony Square's proffer of evidence regarding the intent of the parties. Clearly, Colony Square has been deprived of this fundamental right in the Atlanta Bankruptcy Court.

The lower courts rejected Colony Square's claims solely on their reading of the documents. As was noted in *Stevenson*, 777 F.2d at 418:

> Judgment as a matter of law based solely on the effect of statutory or contract provisions, like summary judgment, may be entered only when it is clear that the truth is known and that there are no disputed material issues of fact requiring resolution by evidentiary hearing.

Colony Square urges this Court to review the Eleventh Circuit's decision so that it may resolve a conflict among the circuits regarding application of the prevention doctrine to relationships commonly found in federal bankruptcy situations. Further, Colony Square urges this Court to review the severance issue in order to have before it all issues implicated by the jurisdictional questions addressed earlier in this petition.

CONCLUSION

For these various reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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